INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Statutory provisions sustaining jurisdiction	1
State statutes the validity of which is involved	2
Dates of judgment and appeal	3
Nature of the case and decisions below	4
Substantiality of questions involved	11
Appendix "A"—Opinion of the Supreme Court of Michigan	22
Appendix "B"—Opinion of the Circuit Court for Wayne County, Michigan	26

Table of Cases Cited

Atchison, Topeka and Santa Fe R. R. Co. v. *Vosburg*, 238 U. S. 56	13
Brown v. *Judge of Superior Court*, 145 Mich. 413	14
Cook Coffee Co. v. *Village of Flushing*, 267 Mich. 131	15
Dent v. *West Virginia*, 129 U. S. 114	14
Hamilton v. *Regents of University of California*, 293 U. S. 245	11
Liggett Co. v. *Baldridge*, 278 U. S. 105	20
Locke v. *Ionia Circuit Judge*, 184 Mich. 535	12
People v. *Phippin*, 70 Mich. 6	10, 17
Ex parte Spinney, 10 Nev. 323	15
State v. *Sunset Ditch Co.*, 48 N. M. 17	15
State ex. rel. Walker v. *Green*, 112 Ind. 462	14
Ex parte Waeholder, 1 Cal. App. (2d) 204	15
Watson v. *Maryland*, 218 U. S. 173	14
Williams v. *The People*, 121 Ill. 84	14

Statutes Cited

Constitution of the United States:	
14th Amendment	11

Michigan:

	Page
Act 134, Public Acts of 1885	2, 4, 8, 9
Act 403, Public Acts of 1913	2, 4, 8, 9
Act 141, Public Acts of 1933	2, 4, 8, 9
Section 14.761, Michigan Statutes Annotated	2

United States Code, Title 28:

Section 1257	1
Section 2101	3
Section 2104	3

Other States:

Section 4135, Business and Professions Code of California	18
Section 2825, General Statutes of Connecticut	18
Section 944, Delaware Revised Code of 1935	18
Section 84-1313, Georgia Code	18
Section 53-2005, Idaho Code	19
Section 101.04, Jones Illinois Statutes Annotated	19
Section 65-1607, Kansas General Statutes of 1935	19
Section 6, Chapter 62, Revised Statutes of 1944 of the State of Maine	19
Section 5040, Compiled Laws of 1929 of Nevada	19
Section 51-908, Statutes Annotated 1941 of New Mexico	19
Section 7002-18, Williams Annotated Code of Tennessee	19
Section 5, Article 4542A, Vernon's Statutes 1936 of Texas	19

BLEED THROUGH—POOR COPY

SUPREME COURT OF MICHIGAN

No. 44148

G. O. BEEMAN, GRACE W. BOWER, HARDING A. FERGUSON, GRACE J. COGAN, RUSSELL L. PALMER, HELEN DUTMERS, ANTHONY BOOMGAARD, JAMES G. GUSTIN, MARGARET RONEY,

Plaintiffs and Appellants,

vs.

MICHIGAN BOARD OF PHARMACY AND A. G. BUCHMAN, JAMES W. LYONS, ELMER T. BENSON, HARRY J. PATERSON, LEON S. LUKASZEWSKI, AS MEMBERS,

Defendants and Appellees

STATEMENT IN SUPPORT OF JURISDICTION

The appellants, G. O. Beeman, et al., in support of the jurisdiction of the Supreme Court of the United States to review the above entitled cause on appeal respectfully represent:

I

Statutory Provisions Sustaining Jurisdiction

The statutory provision which sustains the jurisdiction of the Supreme Court of the United States is Section 1257 of Title 28, United States Code, which reads as follows:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> • • • • • • •
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its

being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

• • • • • • •

II

State Statutes the Validity of Which Is Involved

The statutes of the State of Michigan, the validity of which has been sustained by final judgment of the Supreme Court of Michigan, the highest court of said state, as not being in violation of or repugnant to the Constitution of the United States are Act 134, Public Acts of 1885, as amended by Section 1 of Act 403, Public Acts of 1913, and further amended by Act No. 141, Public Acts of 1933, Michigan Statutes Annotated, Sec. 14.761. The Section provides as follows:

"The state board of pharmacy is authorized and required to issue a certificate to any person as a registered pharmacist as provided by an act entitled 'An act to regulate the practice of pharmacy in the state of Michigan,' same being act number one hundred thirty-four (134) of the public acts of eighteen hundred eighty-five (1885), approved June second (2nd), eighteen hundred eighty-five (1885), and amendments thereto, without examination, upon payment of the fees specified in said act and amendments thereto, who now holds a certificate of a registered assistant issued to any such person at the time said act took effect, and who at such time was eligible and qualified to be granted a certificate of a registered pharmacist instead of a registered assistant under said act and to any person who has been an assistant druggist twenty-five (25) years last past: *Provided,* That any such person shall forward to said board satisfactory proof supported by his affidavit, that he has been engaged in the business of an actual druggist twenty-five (25) years or that he was so eligible and qualified at such time to be

BLEED THROUGH—POOR COPY

given a certificate of a registered pharmacist, setting forth in such affidavit the facts such as were required by said act at the time it took effect, to obtain a certificate of a registered pharmacist, and that he has been continuously engaged in this state since the granting to him of said certificate in the practice of pharmacy as such registered assistant: And *provided further*, That any person now registered as a registered assistant pharmacist in Michigan shall be declared eligible to take the examination for registered pharmacist and that five (5) years' time from the passage of this act be allowed for such assistant pharmacists to pass the examination for full registered pharmacist: And *provided further*, That any such registered assistants who cannot or do not qualify by successfully passing such an examination in keeping with public welfare, shall be required, thereafter, to become a graduate of a school or college of pharmacy or department of pharmacy of a university, recognized by the board, before again being permitted entrance to examination for registration as a pharmacist."

III

Dates of Judgment and Appeal

The date of the judgment of the Supreme Court of Michigan which is sought to be reviewed is January 3, 1949. The judgment became final on January 3, 1949, and the time for taking appeal began to run from that date.

The date on which the application for appeal was presented was March 31, 1949.

Under the provisions of Title 28, United States Code, Sections 2101 and 2104, appellant may present its appeal within 90 days after the entry of the final judgment of the Supreme Court of Michigan.

IV

Nature of the Case and Decisions Below

Most of the pertinent facts were stipulated in the lower court. Other facts were adduced by testimony of certain of the appellants. All of the appellants have for various numbers of years been practicing pharmacy in the State of Michigan under authority of certain certificates issued to said appellants by the Michigan Board of Pharmacy, which certificates were issued by said Board under authority of Act 403, Public Acts of 1913, as amended by Act 141, Public Acts of 1933. The defendant, Michigan Board of Pharmacy, was created by Act 134, Public Acts of 1885 (as amended) and is authorized to grant certificates to persons as registered pharmacists after certain qualifications are fulfilled, as provided in said Act or in Act 403, Public Acts of 1913 (as amended). The individual defendants are, or were at the time of institution of suit, members of the Michigan Board of Pharmacy.

Appellant, G. O. Beeman, on July 29, 1942, made application for a certificate as a registered pharmacist in Michigan and was granted such a certificate by defendant Board of Pharmacy on December 16, 1942. G. O. Beeman, at the time of making application for said certificate, submitted an affidavit of a physician dated July 2, 1942, in which the affiant stated: "that as a physician and surgeon, he has practiced his profession in said state, county and city for a period of 15 years and has known G. O. Beeman, the named applicant on the application attached hereto, for a period of 35 years or more and that of his own personal knowledge, said applicant has been compounding, dispensing and retailing drugs and medicines for the 35 years last past and during 15 years of said time has compounded medicines for and in behalf of deponent."

BLEED THROUGH—POOR COPY

Appellant Grace W. Bower, on December 29, 1941, made application for a certificate as a registered pharmacist in Michigan and was granted such a certificate by defendant Board of Pharmacy on February 16, 1942. Grace W. Bower, at the time of making application for said certificate, submitted affidavits of two persons, dated December 29, 1941, showing that appellant Grace W. Bower began her experience as a pharmacist in 1914, under the supervision of Walter I. Bower, a registered pharmacist in the compounding and dispensing of drugs and medicines.

Appellant Harding A. Ferguson, on November 7, 1941, made application for a certificate as a registered pharmacist in Michigan and was granted such a certificate by defendant Board of Pharmacy on December 30, 1941. Appellant Harding A. Ferguson submitted affidavits with his application showing that he began his experience compounding and dispensing drugs and medicines in 1916.

Appellant Grace J. Cogan, on January 31, 1942, made application for a certificate as a registered pharmacist in Michigan and was granted such a certificate by defendant Board of Pharmacy on February 16, 1942. Appellant Grace J. Cogan submitted proofs that she began her experience as a pharmacist in 1914.

Appellant Russell L. Palmer, on November 3, 1941, made application for a certificate as a registered pharmacist in Michigan and was granted such a certificate by defendant Board of Pharmacy on February 24, 1942. Appellant Russell L. Palmer, at the time of making application for said certificate, submitted affidavits showing that he was engaged in the practice of pharmacy in a drugstore from January 1, 1917.

Appellant Helen Dutmers, on May 27, 1941, made application for a certificate as a registered pharmacist in Michigan and was granted such a certificate by defendant Board of Pharmacy on June 18, 1941. Appellant Heler R. Dutmers

submitted proofs that she had had 27 years of practical experience prior to 1941 compounding drugs under the supervision of a registered pharmacist in a retail drug-store.

Appellant Anthony Boomgaard made application for a certificate as a registered pharmacist in Michigan and was granted such a certificate by defendant Board of Pharmacy on July 20, 1937. Appellant Anthony Boomgaard, prior to issuance of such certificate submitted proofs to defendant Board of Pharmacy that he had been a druggist upwards of 20 years.

Appellant James G. Gustin, on June 4, 1941, made application for a certificate as a registered pharmacist in Michigan and was granted such a certificate by defendant Board of Pharmacy on June 18, 1941. Said James G. Gustin, at the time of filing said application, submitted affidavits showing he began his experience compounding and dispensing drugs and medicines in 1914, and had been engaged in the business of compounding and dispensing drugs for more than 25 years prior to such application.

Appellant Margaret Roney, on September 12, 1941, made application for a certificate as a registered pharmacist in Michigan and was granted such a certificate by defendant Board of Pharmacy on October 9, 1941. Said Margaret Roney, at the time of making application, submitted an affidavit in which affiant stated that said Margaret Roney had been engaged in compounding, dispensing and retailing drugs and medicines for 25 years and 9 months preceding September 12, 1941, under the personal supervision of said affiant.

During the month of September, 1945, defendants claimed that appellants received the certificates as registered pharmacists which had been issued to them by specific misrepresentation, error or fraud and demanded sur-

BLEED THROUGH—POOR COPY

render of the certificate as a registered pharmacist which had previously been issued to each of the appellants.

Appellants instituted suit in the Circuit Court for Wayne County against defendants, setting forth substantially the facts herein stated and stating specifically in the third amended bill of complaint filed November 5, 1947:

"8. Plaintiffs charge that said Act No. 134, Public Acts of 1885, Act No. 403, Public Acts of 1913, Act No. 141, Public Acts of 1933, all as amended, are unreasonable, oppressive, unjust, discriminatory, arbitrary and capricious, and unconstitutional and void as in contravention of the United States and of the Constitution of the State of Michigan:

"The Fourteenth Amendment of the Constitution of the United States provides:

"Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

* * * * * * *

"9. Act No. 134, Public Acts of 1885, as amended, is in violation of the Constitution of the State of Michigan in that:

* * * * * * *

"(d) The statute is retroactive and retrospective in its operation and denies to the plaintiffs the equal protection of the laws and, if enforced, would deprive plaintiffs of their property without due process of law, in violation of the provisions of the Constitution of the United States and the Constitution of the State of Michigan."

Appellants prayed that the defendants be permanently restrained and enjoined from taking any action calculated to enforce the revocation of appellants' certificates as registered pharmacists in the State of Michigan or from doing anything whatsoever to interfere with said appellants in the practice of pharmacy and from causing or attempting to cause any criminal complaint or charge to be made or filed against appellants predicated upon any alleged violation of Act No. 134, Public Acts of 1885, Act No. 403, Public Acts of 1913 and Act No. 141, Public Acts of 1933, all as amended. A temporary injunction had been issued out of the Circuit Court for Wayne County, Michigan, theretofore, on January 2, 1946, by the terms of which defendants were enjoined from doing any of the acts above set forth during the pendency of this suit and until the further order of the court. The matter was tried before Honorable Joseph A. Moynihan, one of the Judges of the Circuit Court for Wayne County, Michigan, and, at the conclusion of the trial, an opinion was rendered by said Judge that the court had no power to grant the relief prayed for by appellants and that the bill of complaint should be dismissed. Pursuant to such opinion, a decree was entered on April 16, 1948, that the bill of complaint be dismissed, provided however, that the temporary restraining orders theretofore issued in the cause be continued to remain in full force and effect until the expiration of time limited for appeal of the cause and until the rendition of the decision of the Michigan Supreme Court, provided that proper applications for orders staying proceedings be filed and noticed for prompt hearing in the Supreme Court by the appellants in the cause prior to the expiration of the time in which the decision might be appealed, and provided further that the Supreme Court should mandate pursuant to such applications.

Thereafter, claim of appeal to the Supreme Court of Michigan was duly filed by appellants and, on the 10th day

BLEED THROUGH—POOR COPY

of June, 1948, an order was entered by the Michigan Supreme Court:

> "In this cause a motion is filed by plaintiffs for an order staying proceedings, and nothing in opposition thereto having been filed by defendants, and due consideration thereof having been had by the Court, It is ordered that a stay of proceedings be and the same is hereby granted by continuing in force the temporary injunction of the trial Court until the further order of this Court, on condition that the appeal be heard at the October, 1948, Term of this Court."

Hearing was had on the appeal to the Supreme Court of Michigan and briefs were filed and, on January 3, 1949, an opinion was rendered by the Supreme Court of Michigan that the bill of complaint be dismissed. On application of appellants, an order was thereafter entered for stay of proceedings during the period permitted for appeal to the Supreme Court of the United States and provided that that application be filed within the time prescribed by the rules of the Supreme Court of the United States. The result is, therefore, the temporary restraining order originally issued in this cause remains in effect.

In the pleadings and in the Circuit Court for Wayne County, the appellants pressed their claim that the statutes of the State of Michigan applicable in this cause are invalid on the ground of being repugnant to the Constitution of the United States. The Statement of Reasons and Grounds of Appeal to the Supreme Court of Michigan stated:

". . . 2. The Trial Court erred in failing to declare Act 134, Public Acts of 1885, Act 403, Public Acts of 1913 and Act 141, Public Acts of 1933, all as amended, unconstitutional as applied to the plaintiffs in this case." The court determined the point adverse to the position of appellants and rendered its decision in favor of the validity of the statute, stating:

"We have considered but find no merit in appellants' further contention that the statute is unconstitutional in that it is alleged to be 'unreasonable, oppressive, unjust, discriminatory, arbitrary and capricious.' In this particular appellants rely upon the Fourteenth amendment to the U. S. Constitution, that no State shall 'deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws;' and upon sections 1 and 16, article 2, of the Michigan Constitution, the first of which guarantees equal protection of the laws, and the other provides 'no person shall . . . be deprived of life, liberty or property, without due process of law.'

"Appellants' contention that the statute is unconstitutional is to some extent based upon their claim that they have a vested property right to practice as pharmacists in consequence of pharmaceutical certificates of registration having been issued to them and because of their unchallenged general qualifications. But appellants could not have and did not acquire vested rights in consequence of there having been issued to them certificates of registration in violation of the law. The drug business and practicing as a pharmacist are matters subject to police regulation, and plaintiffs may not practice as druggists or pharmacists except under the same lawful requirements as are applicable to all other persons.

> 'It must be conceded from cases cited, that the Legislature had power to define the qualifications of those who shall be licensed to practice those callings or professions the exercise of which may affect the public health or safety . . .' *People* v. *Phippin,* 70 Mich. 6, 23.

"Our review of the instant case brings the conclusion that appellants' contention in the respect now under consideration is not tenable, but because it is so strenuously insisted upon in their brief we note the following. In effect appellants contend 'that 25 years is an excessive requirement to qualify as a

BLEED THROUGH—POOR COPY

pharmacist,' and in that respect the statute 'is utterly capricious and out of accord with any reasonable view,' and classification on that basis is not a reasonable classification; but instead is unreasonable, oppressive, arbitrary and unconstitutional. But in our judgment the legislature acted within its constitutional right in enacting this police regulation. In so holding we do not overlook, as pointed out in appellants' brief, that in some other states somewhat similar statutes specify less than 25 years as a requirement of registration or license. Nor can we hold that because of the fact that some of these appellants own a drug store or have investments in this type of business, they are entitled to certificates of registration as pharmacists."

V

Substantiality of Questions Involved

The appellants respectfully represent that the questions involved in their appeal to the Supreme Court of the United States are of a substantial nature. It is well established that an appeal will not be dismissed for want of a substantial federal question, unless the contentions of the appellant are "clearly not debatable and utterly lacking in merit." *Hamilton* v. *Regents of University of California*, 293 U. S. 245, 258, 79 L. Ed. 343, 350.

Appellants contend that the statute of the State of Michigan involved herein, being Act No. 141, Public Acts of 1933, set forth in full in Subdivision II hereof, is violative of the 14th Amendment of the Constitution of the United States, as applied to these appellants. It is the claim of appellants that the statute deprives them of property without due process of law and denies to them the equal protection of the laws. The legislation involved herein is an exercise of the so-called "police power" of the state.

> "That attribute of sovereignty known as 'police power,' though difficult of definition, includes the

power of legislation deemed essential for protection of the public peace, good order, morals, safety and health." *Locke* v. *Ionia Circuit Judge*, 184 Mich. 535, 539, 151 N.W. 263.

The legislation, as enacted, establishes a classification whereby persons engaged in the practice of pharmacy for a period of 25 years or more on the 14th day of August, 1933, are placed in one class and those who have been engaged in the practice of pharmacy for a lesser period than 25 years on the 14th day of August, 1933, are placed in a separate class. The classification adopted by the legislature of the State of Michigan is arbitrary and capricious and without reasonable basis and thereby denies to these appellants the equal protection of the laws and deprives them of their property without due process of law.

Appellants recognize that the legislative department of the government is permitted wide discretion in establishing classification in the ordinary exercise of its "police power." Appellants also recognize that there must be a beginning to regulatory legislation and that a distinction between that which occurs before enactment of regulatory legislation and that which occurs after is not a denial of equal protection of the laws. The legislature of the State of Michigan, however, did not merely distinguish between those practicing pharmacy prior to the regulatory statute in 1933 and those entering such practice thereafter. The legislature provided for exemption from examination of a certain group of persons which it arbitrarily chose. The group granted special exemption by the legislature are those who had been practicing for 25 years or more at that time. The period of 25 years has no relation whatever to the acquisition of skill in the practice of pharmacy.

BLEED THROUGH—POOR COPY

It is this fact which brings the legislation into conflict with the Constitution of the United States.

> "The constitutional guarantee entitles all persons and corporations within the jurisdiction of the state to the protection of equal laws, in this (police regulation) as in other departments of legislation. It does not prevent classification, but does require that classification shall be reasonable, not arbitrary, and that it shall rest upon distinctions having a fair and substantial relation to the object sought to be accomplished by the legislation." *Atchison, Topeka & Santa Fe Railroad Company* v. *Vosburg*, 238 U. S. 56, 59 L. Ed. 1199.

The legislature is, of course, entitled to provide for licensing of persons engaged in certain businesses or professions. The legislature may establish qualifications for obtaining such licenses, including requirements of schooling or experience or examination. The legislature may not, however, provide for an unreasonable amount of schooling or any amount which has no reasonable relation to the profession in which the licensee is to engage. The legislature could not provide for an examination which would be so difficult that no person with reasonable skill in the calling could pass, and the legislature may not provide for an unreasonable amount of past experience as a qualification for engaging in the business or profession.

> "The nature and extent of the qualifications required must depend primarily upon the judgment of the state as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application that they can operate to deprive

one of his right to pursue a lawful vocation." *Dent* v. *West Virginia*, 129 U. S. 114, 32 L. Ed. 623.

It has been claimed by defendant in this cause that because the legislature could refuse to exempt anybody from the requirement of examination for a license to practice pharmacy, therefore, it could exempt or deny exemption to any groups. It apparently is believed that the whole must equal the sum of the parts. The conclusion, however, does not follow. The right to deny exemption from examination to a whole group does not carry with it the right to exempt or refuse exemption to an arbitrary number of such group. cf *Brown* v. *Judge of Superior Court*, 145 Mich. 413, 108 N.W. 717. The distinction between those who have practiced for 25 years or more and those who have practiced for a lesser period of time is completely capricious. No reasonable man would claim that a period of 25 years of practice of pharmacy is necessary to attain sufficient skill in the profession to permit exemption from examination or that it is reasonable to examine persons who have practiced for less than 25 years and not those who have practiced for longer.

There have been a number of cases in which statutes requiring licensing of those who wish to engage in certain businesses or professions have contained clauses exempting from examination applicants who have practiced for certain numbers of years. Such statutes have been held to be a reasonable exercise of legislative discretion in the ordinary case and the statute has been sustained.

Watson v. *Maryland*, 218 U. S. 173, 54 L. Ed. 987;
Dent v. *West Virginia*, supra;
Williams v. *The People*, 121 Ill. 84, 11 N.E. 881;
State, ex rel., Walker v. *Green*, 112 Ind. 462, 14 N.E. 352.

BLEED THROUGH—POOR COPY

In such cases, however, the time established by the legislature as a qualification for exemption was considered by the court to have a reasonable relation to the skill involved in the calling. Where the time has no reasonable relation to the skill involved in the calling, legislation which provides for exemption on the basis of doing business or practicing profession for a certain period of time has been held unconstitutional.

Cook Coffee Company v. *Village of Flushing*, 267 Mich. 131, 255 N.W. 177;

Ex Parte Wacholder, 1 Cal. App. (2nd) 204, 36 P. (2nd) 705;

State v. *Sunset Ditch Company*, 48 N.M. 17, 145 P. (2nd) 219;

Ex Parte Spinney, 10 Nev. 323.

The case of *Ex Parte Spinney*, supra, involved a Nevada statute setting up qualifications for the practice of medicine. The Act provided that persons who had practiced medicine or surgery in the state for a period of 10 years next preceding the passage of the act should be exempted from the provisions of the act. The court held unconstitutional the provision for exemption on the basis of practice of 10 years next preceding the passage of the act. It stated:

> "The third point urged by the petitioner is not so easily met. There does not seem to be any reason for allowing a physician or surgeon to continue practice because he has been practicing during the last ten years, which does not equally apply to the case of one who has practiced ten years or more, but not continuously during the ten years just elapsed. If any reason for this discrimination has been suggested, it is so extremely fanciful that it cannot be supposed to have influenced the Legislature, and I feel bound

to say that the distinction appears to me to be purely arbitrary.

* * * * * * *

"But I think the provisions of the Federal Constitution above referred to give greater scope to the judicial authority. They regard the substance not the form of laws; are aimed against all arbitrary discriminations against citizens, whether created by a general or specific law, and the courts, for the purpose of enforcing them, must necessarily consider the apparent object and intent of a law which seems to abridge the privileges or immunities of a citizen, or class of citizens of the United States. Now, I entertain no doubt that amongst the inherent privileges of the citizens of a free country is the right to pursue a lawful calling in a lawful manner, that is, subject to such restrictions and none other as may be deemed necessary for the public welfare.

"What restrictions are necessary in that view it is the province of the Legislature to decide, and its decision, no matter how ill advised it may appear to be, is binding on the courts whenever it appears to have been based on motives of policy or general expediency. But when a law excludes a class of citizens from the pursuit of a useful, honorable and profitable avocation, and there is no assignable motive of policy or expediency to justify the exclusion; or, in other words, when it is apparent that the whole scope and object of the law is to make a forbidden discrimination, without looking to the attainment of any public benefit, I think a court should not hesitate to say that such a law is forbidden by the Fourteenth Amendment to the Federal Constitution.

"With respect to this law I have said in another connection that I do not feel justified in holding that there is no good reason for requiring ten years' practice in this state as a qualification for the continued practice of medicine or surgery. But I do think that there is no sort of reason for requiring that practice to

BLEED THROUGH—POOR COPY

have extended over the particular ten years immediately preceding the enactment of the law, and to this extent I am prepared to go in holding it unconstitutional."

The period of 25 years of practice has no relation whatever to skill in the calling of pharmacy. There have been a very large number of state statutes enacted in which persons who have practiced pharmacy for a certain period of time have been exempted from examination. Appellants have discovered no statute by any state of the United States other than Michigan which based exemption on a period of 25 years of practice.

When the legislature of the State of Michigan determined to exempt a certain part of the group of persons who were practicing pharmacy in 1933 and refused exemption to other members of the group, it was obliged to make the division on the basis of natural distinguishing characteristics. As stated by the Michigan Supreme Court in *Cook Coffee Company* v. *Flushing*, supra, at page 134:

> "These constitutional provisions do not mean that there can be no classification in the application of statutes and ordinances, but only that the classification must be based on natural distinguishing characteristics and must bear a reasonable relation to the object of the legislation."

The difference between proper exercise of discretion and arbitrariness is only a matter of degree. It is easy to say as did the Michigan Supreme Court in its decision in this case that the legislature "acted within its constitutional right" in determining the classification it did. The Supreme Court of Michigan made the same statement in regard to licensing of physicians in the case of *People* v. *Phippin*, 70 Mich. 6, 37 N. W. 888, which the Court cited in its decision in this case. But the legislation involved in that case pro-

vided that it should not be lawful for any person to practice medicine or surgery unless he should either be a graduate of a legally authorized medical college or should have actually practiced medicine continually for at least 5 years in the state and was practicing when the Act took effect. If the legislature was reasonable in determining that 5 years' practice of medicine should be sufficient to enable the person to be considered qualified, appellants contend it can not be said that the legislature is reasonable in saying that to be qualified to practice pharmacy, other than after examination, a person must have practiced for 25 years.

The court which says that 25 years of practice is a reasonable basis for classification would presumably say that any number of years which the legislature might choose is a reasonable basis. It does not seem possible to say that 25 years can be considered reasonable, but that 30 or 40 or 50 years would not be reasonable. On the other hand, appellants do contend that to say that 5 years of practice is a reasonable basis for classification is not reason for saying also that 15 or 20 or 25 years is a reasonable period.

As has been many times stated the basis of the classification must have some relationship to the purpose of the legislation. It is clear that the purpose of this legislation is the protection of the public health. A similar purpose exists in the licensing of physicians. Many other states, in providing for licensing physicians, have excluded from the requirement of examination those who have been practicing for a certain number of years. In California it was 5 years (Section 4135 of the Business and Professions Code of California); in Connecticut it was 8 years (Section 2825 General Statutes of Connecticut); in Delaware, 4 years (Section 944 Delaware Revised Code of 1935); in Georgia, 3 years (Section 84-1313 Georgia Code); in Idaho, 4 years

BLEED THROUGH—POOR COPY

(Section 53-2005 Idaho Code); in Illinois, 5 years (Jones Illinois Statutes Annotated, Section 101.04); in Kansas, 4 years (General Statutes 1935, Section 65-1607); in Maine, 4 years (Chapter 62, Section 6 Revised Statutes of 1944 of the State of Maine); in Nevada, 5 years (Section 5040, *et seq.*, of the Compiled Laws of 1929 of Nevada); in New Mexico, 6 months (Section 51-908 Statutes Annotated 1941 of New Mexico); in Tennessee, 3 years (Section 7002.18 of Williams Annotated Code of Tennessee); in Texas, 4 years (Section 5, Article 4542A of Vernon's Statutes 1936 of Texas). As stated above, in Michigan it was 5 years (Public Acts 1943, No. 58, which is Section 14.761 M. S. A., as amended). These various periods of time of practice were judged by legislatures to be a reasonable basis for exemption of one class of persons from the requirement of examination. These legislatures were dealing with the practice of medicine. It is not reasonable, within the bounds of reasonableness shown by such legislation, for the Michigan legislature to discriminate between two classes of persons on the ground of practice of pharmacy for a period of 25 years as distinguished from practice for a period less than 25 years.

The legislation, the constitutionality of which is here involved, not only denies to all of these appellants the equal protection of the laws, but also deprives appellants of their property without due process of law. Each of the appellants has a property right in the practice of his profession of pharmacy. Many of these appellants have invested their savings in stores for the dispensing of drugs. These appellants, all of whom had been practicing pharmacy for a period of 15 years or more prior to the enactment of the statute in 1933, and all of whom had been actually engaged in the practice of pharmacy for 25 years or more prior to the bringing of this litigation, certainly must be

deemed to have acted reasonably in making investments for the acquisition of their own businesses for the purpose of practicing their profession. *Yet, if this legislation is to* be upheld, these appellants can no longer practice their profession unless they are able to pass an examination of whatever "stringency or difficulty" (*Dent* v. *West Virginia, supra*), the Board of Pharmacy may wish to give them. If they are unable to pass, they will be deprived of the right to practice the profession in which they have been engaged during most of their lives. As a practical matter, they will be deprived of the drugstores in which they have invested their savings. The court may take judicial notice that the ordinary drugstore, particularly the small town drugstore, is not an economic enterprise which can afford to hire the services of a registered pharmacist and yet represent a profitable investment to the owner.

The effect of this legislation, if it be sustained, is to require these appellants to dispose of their drugstores. This Court has held that a state cannot require that the owner of a drugstore or the owner of stock of a corporation which owns a drugstore must be a licensed pharmacist. *Liggett Company* v. *Baldrige*, 278 U. S. 105, 73 L. Ed. 204. It is actually the denial of due process of law to require by statute that the owner of a drugstore must have practiced pharmacy for at least 25 years or must be able to pass an examination of whatever stringency or difficulty the Board of Pharmacy may choose. While this legislation does not in terms contain any such requirement and while it would not have such effect in many cases, as applied to these appellants, that would be the result of the legislation.

If the legislation be sustained all of the appellants will be deprived of the right to practice the profession of pharmacy in which they have engaged for more than thirty years. The taking of such right by legislation is deprivation of property without due process of law.

BLEED THROUGH—POOR COPY

Appellants therefore contend that there is presented to this court a substantial question as to whether or not Act 134, Public Acts of 1885, as amended by Section 1 of Act 403, Public Acts of 1913, and further amended by Act No. 141, Public Acts of 1933, is not repugnant to the Constitution of the United States, because it denies to these appellants the equal protection of the laws, and because it deprives them of their property without due process of law.

It is therefore respectfully submitted that this court has jurisdiction of this appeal under Section 1257 of Title 28 of the United States Code.

DYKEMA, JONES & WHEAT,
NATHAN B. GOODNOW,
2746 Penobscot Building,
Detroit 26, Michigan,
Attorneys for Plaintiffs and Appellants.

APPENDIX "A"

STATE OF MICHIGAN, SUPREME COURT

G. O. Beeman, Grace W. Bower, Harding A. Ferguson, Grace J. Cogan, Russell L. Palmer, Helen Dutmers, Anthony Boomgaard, James G. Gustin, Margaret Roney, *Plaintiffs and Appellants,*

v.

Michigan Board of Pharmacy and A. G. Buchman, James W. Lyons, Elmer T. Benson, Harry J. Paterson, Leon S. Lukaszewski, as Members, *Defendants and Appellees.*

Before the Entire Bench, except Dethmers, J.

North, *J.:*

The Michigan board of pharmacy and its individual members, defendants herein, having taken action in the matter of revoking the certificates of registration of the plaintiffs as pharmacists, notified each of plaintiffs that his or her pharmaceutical license "is revoked." Thereupon this suit to restrain defendants "from taking any action calculated to enforce the revocation of plaintiffs' licenses as registered pharmacists" was instituted on October 15, 1945, and by temporary injunction defendants' revocation orders were stayed. The decree entered after hearing was adverse to plaintiffs and they have appealed.

It is stated in appellants' brief:

"The plaintiffs in this case are all pharmacists, who have practiced their profession continuously in the State of Michigan for substantially all of their professional lives. • • • Some of them own and operate drug stores, some are employed in drug stores owned by others. Most of them have made substantial investments in the establishments where they are professionally active. No complaints have been registered against them at any time by the Michigan Board of Pharmacy or by any other agency of the State or by any other person, as to their skill, integrity, training or professional qualifications.

BLEED THROUGH—POOR COPY

"In 1885 the Michigan Legislature passed P.A. 134, which was intended to regulate the practice of pharmacy in the State of Michigan. • • • It created a Board of Pharmacy and set out its duties and powers; and also provided qualifications for the practice of pharmacy and standards for the operation of drug stores."

At the time there was issued to each of appellants a certificate of registration as a pharmacist, the applicable statute provided:

"The state board of pharmacy is authorized and required to issue a certificate to any person as a registered pharmacist • • • who has been an assistant druggist twenty-five years last past: *Provided,* that any such person shall forward to said board satisfactory proof • • •." Act No. 141, § 1, Pub. Acts 1933.

In Stebbins *v.* State Board of Pharmacy, 297 Mich. 676, we had occasion to consider the above quoted statutory provision. In an opinion signed by four justices and concurred in by two others, referring to the fact that the same words were embodied in Act No. 403, Pub. Acts 1913, we said: "In the earlier act these words fixed a time limitation of 'twenty-five years last past' prior to 1913; but as used in the later (1933) act they fixed a period of 'twenty-five years last past' prior to 1933", meaning prior to the effective date of the respective acts. In Pharmaceutical Assn. *v.* Pharmacy Board, 310 Mich. 23, 29, we said "proper construction was placed upon the act in the *Stebbins Case.*"

Notwithstanding the above construction of the statute, which seems rather clear and definite, the board of pharmacy, possibly due to erroneous advice, misconstrued the statute by interpreting it to mean that the qualifying 25 year period should be considered as the 25 years preceding the date on which one applied for registration as a pharmacist; and it was under such construction that certificates were issued to the plaintiffs herein, notwithstanding they had not practiced as pharmacists or assistant pharmacists during the "twenty-five years last past" preceding the effective date of the 1933 statute. Upon discovering that

under the above misinterpretation of the statute pharmaceutical certificates had been issued to plaintiffs and certain other persons, notification of cancellation of such erroneously issued certificates was sent to the respective parties. The notices of such revocation gave as a reason therefor "that it (the certificate) was issued and obtained by misrepresentation, error or fraud."

It is contended by appellants that the board of pharmacy was without statutory authority to cancel these certificates; but we are of the opinion this contention cannot be sustained. Clearly plaintiffs' certificates were issued to them as a result of an error in determining that they were lawfully entitled to certificates of registration since they had been either druggists or assistant druggists for at least 25 years preceding their applications for certificates of registration, notwithstanding they had not been druggists during "twenty-five years last past" prior to the effective date of the 1933 act. Under such circumstances the authority of the board of pharmacy to revoke the erroneously issued certificates is expressly conferred by the statute, which reads:

"If any registered pharmacist or registered assistant pharmacist shall have obtained a license by misrepresentation, error or fraud * * * the state board of pharmacy shall have the power to revoke or suspend such license or certificate after giving any such person reasonable notice and an opportunity to be heard * * *." 2 Comp. Laws 1929, § 6,845; Stat. Ann. § 14.741.

Further, under the above statute, it cannot be held, as appellants contend, that while the board of pharmacy has the power to cancel a license, it is not empowered to cancel a certificate of registration, which certificate appellants assert gave a vested right. The statute provides that, under the conditions specified, "the state board of pharmacy shall have the power to revoke or suspend such *license or certificate* * * *." The record does not disclose whether appellants were given an opportunity to be heard, as provided in the above statute, but they have made no point of their rights in that respect.

BLEED THROUGH—POOR COPY

We have considered but find no merit in appellants' further contention that the statute is unconstitutional in that it is alleged to be "unreasonable, oppressive, unjust, discriminatory, arbitrary and capricious." In this particular appellants rely upon the Fourteenth amendment to the U. S. Constitution, that no State shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"; and upon sections 1 and 16, article 2, of the Michigan Constitution, the first of which guarantees equal protection of the laws, and the other provides "no person shall • • • be deprived of life, liberty or property, without due process of law."

Appellants' contention that the statute is unconstitutional is to some extent based upon their claim that they have a vested property right to practice as pharmacists in consequence of pharmaceutical certificates of registration having been issued to them and because of their unchallenged general qualifications. But appellants could not have and did not acquire vested rights in consequence of there having been issued to them certificates of registration in violation of the law. The drug business and practicing as a pharmacist are matters subject to police regulation, and plaintiffs may not practice as druggists or pharmacists except under the same lawful requirements as are applicable to all other persons.

"It must be conceded, from cases cited, that the Legislature has power to define the qualifications of those who shall be licensed to practice those callings or professions the exercise of which may affect the public health or safety • • •." People v. Phippin, 70 Mich. 6, 23.

Our review of the instant case brings the conclusion that appellants' contention in the respect now under consideration is not tenable, but because it is so strenuously insisted upon in their brief we note the following. In effect appellants contend "that 25 years is an excessive requirement to qualify as a pharmacist," and in that respect the statute "is utterly capricious and out of accord with any reasonable view," and classification on that basis is not a reasonable

classification; but instead is unreasonable, oppressive, arbitrary and unconstitutional. But in our judgment the legislature acted within its constitutional right in enacting this police regulation. In so holding we do not overlook, as pointed out in appellants' brief, that in some other states somewhat similar statutes specify less than 25 years as a requirement of registration or license. Nor can we hold that because of the fact that some of these appellants own a drug store or have investments in this type of business, they are entitled to certificates of registration as pharmacists.

Since the foregoing is decisive of decision herein there is no need of this Court rendering a declaratory decree "definitely fixing and defining the rights of the parties under the terms of the statute," as sought in plaintiffs' prayer for relief. The decree entered in the circuit court dismissing plaintiffs' bill of complaint is affirmed, and the order entered in this Court continuing during the pendency of this appeal the force and effect of the temporary injunction issued in the circuit court is set aside. Appellees may have costs of this Court.

APPENDIX "B"

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

IN CHANCERY

No. 385160

G. O. Beeman, et al., *Plaintiffs,*

vs.

State Board of Pharmacy, *Defendant*

Opinion of the Court

Plaintiffs in this cause file their Bill of Complaint against the Michigan Board of Pharmacy and its individual members as defendants, seeking injunctive relief restraining

BLEED THROUGH—POOR COPY

said Board and the members thereof from "taking any action calculated to enforce the revocation of plaintiffs' licenses as registered pharmacists in the State of Michigan or from doing anything whatsoever to interfere with said plaintiffs in the practice of pharmacy and from causing or attempting to cause any criminal complaint or charge to be made or filed against plaintiffs predicated upon any alleged violation of Act No. 134 Public Acts of 1885, Act No. 403 Public Acts of 1913, and Act No. 148 Public Acts of 1933, all as amended."

Plaintiffs also demand that the Board and its members restore to plaintiffs all licenses heretofore seized by the defendants or their agents.

In addition to the foregoing, plaintiffs request this court, by appropriate decree, to make a binding declaration or rights pursuant to Sections 13903-13909, Compiled Laws of 1929, definitely fixing and defining the rights of the parties under the terms of the statutes and by such decree or order this court to declare null and void Act 134 Public Acts of 1885, Act No. 403 Public Acts of 1913 and Act No. 141 Public Acts of 1933, all as amended.

It will be seen from the foregoing that the issues in this litigation concern the construction, validity and constitutionality of the various statutes of the State setting up and defining the practice of the profession of pharmacy and the duties and powers of the Board and its members with respect to carrying out the terms of the several enactments.

While the plaintiffs insist that their licenses have been revoked arbitrarily by the Board and counsel insists that the words "license" and "certificate" have a different meaning in the particular sections of the Act under discussion, I feel that these particular questions have already been disposed of by our Supreme Court on two different occasions, in the cases of *Stebbins v. State Board of Pharmacy*, 297 Mich. 676, and *American Pharmaceutical Association v. Michigan Board of Pharmacy*, 310 Mich. 23. Both these cases had to do with the construction of the original and amended Acts under consideration. In each instance the Board was the respondent in mandamus proceedings. In the Stebbins case, it was ordered to issue

certificate to the petitioner as a registered pharmacist and in the Pharmaceutical Association case it was called upon to revoke licenses issued by it to alleged pharmacists.

It will be seen from this that in both instances the Board was a two-time loser and it now is brought into court again, this time in a chancery proceeding to restore licenses which it evidently revoked under and by virtue of the decision in the Pharmaceutical Association case.

I feel, from a reading of both these cases, that the Board is well within its prerogatives in its conduct in the instant case and especially so in view of the fact that our Supreme Court has already construed the Act setting up the Board and the powers and duties thereof.

I am also of the opinion that if plaintiffs are aggrieved, they must apply to the Board for a restoration of their licenses and the Board should give them a hearing with respect to their several petitions if requested.

However, I do not feel, under the pleadings and stipulated facts, that this court has the power to grant the relief prayed for in the third amended bill of complaint of the plaintiffs. Neither do I feel that this court can set aside the Act of the Legislature in setting up the Board and the several amendments thereto, under the pleadings and proofs as presented.

Being of the opinion as outlined herein, it follows that the bill of complaint be and the same is hereby dismissed. A public question being involved, no costs are awarded.

JOSEPH A. MOYNIHAN,
Circuit Judge.